United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

74 1119

UNITED STATES COURT OF APPEALS
For The Second Circuit

AVIS RENT A CAR SYSTEM, INC.,

Plaintiff-Appellee,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellant.

PETITION OF PLAINTIFF-APPELLEE AVIS RENT A CAR SYSTEM, INC., FOR REHEARING, OR, ALTERNATIVELY, FOR REHEARING IN BANC

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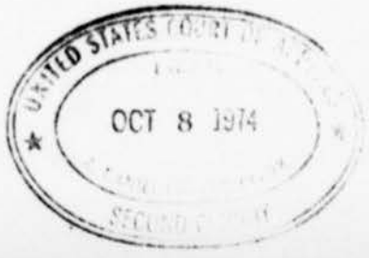

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UNITED STATES COURT OF APPEALS
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Docket No. 74-1119

AVIS RENT A CAR SYSTEM, INC.,

Plaintiff-Appellee,

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PETITION FOR REHEARING,
OR, ALTERNATIVELY, FOR
REHEARING IN BANC

Plaintiff-Appellee Avis Rent A Car System, Inc., ("Avis"), petitions this Court, pursuant to Rules 35 and 40, F.R. Ap. P., for rehearing, or, in the alternative, suggests rehearing in banc, of the decision of this Court rendered September 24, 1974. The decision reversed a judgment by the District Court (Travia, D. J., 364 F. Supp. 605), which had held that "car shuttlers" were not Avis employees, but rather independent contractors, and hence Avis had no liability for federal employment tax on their behalf. The panel (Judges Medina, Hays and Oakes) ruled that the district court erred in

not finding that the shuttlers were Avis employees, and that Avis was therefore liable to pay federal taxes arising from their employment. Accordingly, the case was remanded to determine the amount of Avis's tax liability.

We respectfully submit that contrary to well-established case law, the panel erred in making a de novo determination of an essentially non-technical, factual issue -- whether the shuttlers were "employees" or "independent contractors". Moreover, the panel substituted its judgment on this matter of fact without any finding that the district court's view of the facts was clearly erroneous. Unless the law of this circuit is to be altered, such a procedure is patently impermissible.

Moreover, even if the panel were correct in finding that some shuttlers, who dealt directly with Avis, were Avis employees, it overlooked the fact -- recognized by the court below and conceded by the government -- that other shuttlers were provided to Avis by independent businessmen, and were paid and employed by those contractors rather than Avis. There can be no conceivable rationale by which Avis can be liable to pay employment tax for shuttlers in the hire of other business organizations. Accordingly, if this Court is disinclined to grant reargument and reverse the panel decision as to the class of shuttlers in toto, the panel's decision should be modified to direct the district court to determine on remand

the number of shuttlers who were the employees of independent contractors, and to exclude such shuttlers from the class for whom Avis must pay federal employment tax.

REASONS FOR GRANTING REHEARING

I

THE PANEL DECISION IGNORES THE DISTRICT COURT'S FINDINGS OF FACT, AND IMPERMISSIBLY SUBSTITUTES ITS VIEW OF THE FACTS FOR THAT OF THE DISTRICT COURT

The panel, by substituting its view of the facts for that of the district court, overlooked controlling case law which forbids the appellate court to make an independent determination of fact in the absence of "clear error" below.

There can be no doubt as to the correct standard of appellate review governing this case. First set forth by the Supreme Court in Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 291 (1960), the proper scope of review was described by Judge Friendly in these terms:

> "The Supreme Court's decision [in Duberstein] rested on the belief that where a court must apply a statutory tax standard of a 'nontechnical nature,' decision necessarily turns on 'the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, and their various combinations, creating the necessity of ascribing the proper force to each,' 363 U.S. at 289, 80 S.Ct. at 1199; determination 'must

> be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case', 363 U.S. at 289, 80 S.Ct. at 1198 . . . Thus 'appellate review of determinations in this field must be quite restricted', and the findings of a trial judge, including 'factual inferences from undisputed basic facts * * * as will on many occasions be presented in this area', are not to be upset unless 'clearly erroneous'," Bessenyey v. Commissioner of Internal Revenue, 379 F.2d 252, 257 (2d Cir. 1967) (emphasis added).

Applying this strict standard of "clear error", the Bessenyey court declined to reverse even though it feared the district court's decision might "have the unfortunate consequence of lessening the predictability preculiarly essential in tax matters." Bessenyey, supra, at 257.

Few areas in the tax law are of a less "technical" nature than the subject matter of this litigation. In fact, reference to "the usual common law rules applicable in determining the employer-employee relationship" is dispositive of the case at bar. Section 3121(d)(2), Internal Revenue Code of 1954. Thus the common law, rather than abstruse and technical considerations of tax law, governs.

Nor did the district court fail to apply the common law. On the contrary, after canvassing all relevant considerations, the trial court held that the facts "in their totality" --

including "the lack of a seniority system, the irregular work patterns of the 'shuttlers', the lack of benefits for 'shuttlers', and the 'shuttlers' ability to work for competitors" led to the conclusion that the shuttlers were independent contractors. 364 F. Supp. 605, 613.

The panel, however, emphasized "other factors, factors due at least equivalent weight which tend to indicate that shuttlers are employees." Slip op. at 5541. And on its view of the facts -- though without ever stating that the district court was in clear error -- the panel reversed the judgment below.

The panel decision does not cite Duberstein, does not cite Bessenyey, does not cite any of the authorities dealing with the standard to be met in order to reverse a factual determination of the trial court. We suggest that the panel failed to apply the relevant standard as well.

If the Duberstein rule is to be eviscerated or abandoned in this circuit, and an enlarged scope of appellate review adopted by this Court, such an important and novel step should be taken only after consideration by the full Court and clearly stated with one voice.

II

THE PANEL DECISION OVERLOOKS THE FACT THAT SOME SHUTTLERS WERE EMPLOYED BY INDEPENDENT CONTRACTORS, AND IN NO EVENT CAN AVIS HAVE TAX LIABILITY ON THEIR BEHALF

Assuming, arguendo, that the panel correctly decided that shuttlers dealing directly with Avis were Avis employees, the record below affirmatively demonstrates that other shuttlers had a completely different relationship with Avis -- that they were in the pay and employ of independent businessmen, whose occupation it was to provide shuttlers for Avis and Avis's competitors. Such shuttlers can by no stretch of logic be termed Avis employees, yet the panel totally overlooks this distinction in ruling that Avis must pay employment tax for the class of shuttlers in toto.

The panel's failure to draw distinctions between shuttlers who worked directly for Avis, as opposed to those working for independent businessmen, is all the more remarkable since this distinction was brought to the attention of the Court by the Government itself, which conceded that Avis had no tax liability for those shuttlers employed by independent contractors:

> "It may well be that the record would support the conclusion that, in isolated cases, taxpayer established a different mode of dealing with its car shuttlers whereby it did, in fact, relinquish any right of control over the shuttling operation to persons who established themselves as independent businessmen who hired their own employees to serve as car shuttlers. But we submit that such excep-

> tional arrangements cannot affect taxpayer's liability to withhold and pay employment taxes with respect to the great majority of car shuttlers, whom taxpayer engaged under totally different conditions." (G. Br. 24)

Moreover, the court below recognized that "[i]n many instances, Avis dealt with 'head shuttlers' who made it their business to select the individual 'shuttlers'," 364 F. Supp. 611. Robert Goslind is one example of such an independent entrepreneur. Goslind established his own auto transport service, doing business under the name of King Transport Company (III-R 412)*. He duly received a business license from the City of Seattle (III-R 412; V-R 828). His transport service shuttled automobiles not only for Avis, but for Avis's competitors as well -- Hertz, Budget, and Airways (III-R 413). Goslind himself hired the shuttlers, and he -- not Avis -- paid them (III-R 414-416; 418-419). Contracts with Avis were made in the name of "King Transport Company" (III-R 416-417), and Goslind sent an invoice to Avis on a weekly basis for services rendered by his employees (III-R 420).

The sweeping language of the panel decision places shuttlers who work for independent businessmen like Goslind in the same barrel as those working directly for Avis. By ignoring the crucial -- and glaring -- distinction between these two classes

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* "I-R" through "V-R" references are to the five separately bound volumes of the record appendix.

of shuttlers, the panel would make Avis pay employment tax for individuals employed by another business organization. Nothing could be more impermissible.

A leading case relied upon by the panel is overlooked in this connection. In United States v. Silk, 331 U.S. 704, 719 (1947), the Court found that various driver-owners of trucks were independent contractors rather than employees:

> "These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

All of these factors -- except, for obvious reasons, ownership of the cars shuttled for Avis -- apply equally to independent businessmen such as Goslind who serve Avis. Accordingly, those who work for contractors like Goslind are their employees, for whom Avis has no employment tax liability.

We respectfully suggest that even if the Court declines our invitation to review the fundamental basis of its decision, the case should be remanded and the district court instructed to determine the number of shuttlers who were employed by independent contractors rather than Avis. The district court

should be further instructed to exclude such shuttlers from the employee class in determining the amount of Avis's tax liability.

Conclusion

This petition should be granted and on rehearing, or rehearing in banc, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Plaintiff-Appellee, : Docket No. 74-1119

-against-

UNITED STATES OF AMERICA,

Defendant-Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STEVEN E. LANDERS, being sworn, states:

1. I am an attorney associated with the firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for the plaintiff-appellee Avis Rent A Car System, Inc., in the above-entitled action.

2. On October 8, 1974, I served true copies of the within Petition for Rehearing, Or, Alternatively, For Rehearing In Banc, upon the attorneys listed below by depositing the same, in properly addressed and sealed postpaid envelopes, in a mail depository under the exclusive care and custody of the United States Postal Service within the State of New York:

Scott P. Crampton
Assistant Attorney General
Tax Division
Department of Justice
Washington, D.C. 20530

David Trager, Esq.
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Steven E. Landers

Steven E. Landers

Sworn to before me this

8 day of October, 1974.

Francine Novak

Notary Public

FRANCINE NOVAK
Notary Public, State of New York
No. 31-9576955
Qualified in New York County
Commission Expires March 30, 1976